Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
Appellants

—*v.*—

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT FILED AUGUST 15, 1979
PROBABLE JURISDICTION NOTED NOVEMBER 13, 1979

In the Supreme Court of the United States

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* The following appear in the appendix to the Jurisdictional Statement and have not been reprinted:

Order granting summary judgment (J.S. App. 1a); Memorandum Opinion of the district court (J.S. App. 3a); and Notice of Appeal (J.S. App. 14a).

Docket No. 78-0128

JERRICO, INC.
PLAINTIFF

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.
DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1978	
Jan 25	COMPLAINT; Appearance.
Jan 25	SUMMONS (7) and copies (7) of complaint issued; U.S. Atty. serv. 1-26-78; defts. #1,2,3,4 serv. 1-30-78; #5 serv. 1-31-78;
Mar 27	MOTION of defts. for extension of time to respond to complaint; c/m. Appearance of Paul E. Myerson.
Mar 31	ORDER filed 3-30-78 granting motion of deft. to & until April 6, 1978 to answer complaint. (N) GASCH, J.
Apr 3	MOTION of defts. to dismiss; statement of P&A's; attachments (4); c/m 4-3-78. Appearance of Paul E. Myerson.
Apr 17	OPPOSITION of pltf. to defts. motion to dismiss; statement of P&A's.
Apr 27	INTERROGATORIES of pltf. to defts. (First Set).
May 11	MOTION by defts. for enlargement of time for responding to interrogatories (first set) of pltf.
May 16	ORDER filed on 5-12-78 granting motion of defts extension of time of 90 days to answer pltfs. interrogatories pending Court's determination of defts. pending motion to dismiss complaint. (N) Gasch, J.

DATE	PROCEEDINGS

May 18 MOTION of defts. to dismiss complaint heard, argued and taken under advisement. (Rep: J. Moore) Gasch, J.

May 25 MEMORANDUM of the Court filed on 5-24-78. (N) Gasch, J.

May 25 ORDER filed on 5-24-78 denying motion of defts. to dismiss complaint. (N) Gasch, J.

May 26 ANSWER by defts. to the complaint.

May 26 CALENDARED.

Aug 7 MOTION of defts. for enlargement of time to 10-23-78 for responding to pltfs. interrogatories (first set).

Aug 10 ORDER filed 8-8-78 extending defts. time to and including 10-23-78 to respond to pltfs. first set of interrogatories. (N) Hart, J.

Oct 23 ANSWERS of federal defts. to pltfs. first set of interrogatories; exhibits A-D.

Dec 04 CALENDAR CALL, action to be set for cross-motions for summary judgment sometime in the middle of January, 1979. (Rep: Joan Blair) GASCH, J.

1979

Jan 15 MOTION of pltf. for summary judgment; statement of P&A's; table of contents; table of cases and authorities; statement of material facts.

Feb 5 STATEMENT by federal defts. in opposition to pltfs. motion for summary judgment; statement of genuine issues; exhibit A.

Mar 15 STIPULATION of pltf. in response to defts. statement of genuine issues necessary to be litigated; exhibit A.

Mar 19 MOTION of pltf. for summary judgment heard, argued and taken under advisement. (Rep: R. Griffey) Gasch, J.

DATE	PROCEEDINGS

May 8 MEMORANDUM of the Court filed 5-7-79. (N) Gasch, J.

May 8 ORDER filed 5-7-79 granting motion of pltf. for summary judgment; defts. are hereby enjoined from enforcing Section 16(e) of the Fair Labor Standard Act, 29 USC 216(e) against pltf. and are further enjoined from requiring the payment of civil money penalties assessed against pltf. (N) Gasch, J.

May 17 NOTICE of appeal to the U.S. Supreme Court by defts. Govt. no fee. copy mailed to Thomas W. Power.

May 17 MOTION of defts. for a stay of the judgment entered on 5-7-79, pending appeal, including defts. statement in support thereof; affidavit of Lucille C. Pinkett; affidavit of William R. Riese; affidavit of Herbert J. Cohen.

May 29 STATEMENT of P&A's of pltf. in opposition to defts. motion for a stay pending appeal.

June 13 ORDER filed 6-12-79 denying motion of defts. for a stay pending appeal. (N) Gasch, J.

June 25 CHANGE of address of counsel for pltf.

Oct 18 TRANSCRIPT of proceedings of 5-18-79, pages 1-29. (Rep: J. Moore); Court copy.

Oct 18 TRANSCRIPT of proceedings of 3-19-79, pages 1-37, (Rep: J. Moore); Court copy.

Nov 14 LETTER dated 11-13-79 from Clerk, Supreme Court of the U.S. to Clerk, USDC to certify and transmit the entire record.

Nov 15 CERTIFIED copy of ORDER. U.S. Supreme Court noting probable jurisdiction in this case.

[SEAL]

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-CL-105

IN THE MATTER OF:

RAY MARSHALL, Secretary of Labor
United States Department of Labor, PLAINTIFF

v.

JERRICO, INC., RESPONDENT

Before: PETER McC. GIESEY
Administrative Law Judge

DECISION AND ORDER

This is a proceeding brought under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, *et seq.* (hereafter "the Act")[1] and Regulations promulgated

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[1] Specifically, section 216(e);

(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

(1) deducted from any sums owing by the United States to the person charged.

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, United States Code and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes" (29 U.S.C. 9a).

by the Secretary of Labor pursuant to authority under the Act.

A hearing was held on January 18 and 19, 1977 in Lexington, Kentucky. Briefly, the record shows the following.

Statement of the Case

The facts are undisputed unless otherwise indicated.

Jerrico, Inc. is engaged in the business of establishing, managing and operating restaurants. The annual gross volume of business during the relevant period herein (1974 and 1975) exceeded $250,000 yearly. Jurisdiction under the Act is not in issue.

Among the restaurants operated by Jerrico, Inc. are 39 or 40 enterprises trading as "Jerry's," located in Kentucky, Indiana, Tennessee, Georgia and Florida.

In 1969, an investigation of "Jerry's," Harrodsburg Road, Lexington, by a Department of Labor compliance officer disclosed that a 15 year old waitress had worked later than 7 p.m. in violation of Child Labor Regulation number 3.[2] The compliance officer testified that he delivered a notice (form 103) to the corporation controller.

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[2] 29 C.F.R. 570.35(a), *viz.*;

. . . [employment of minor employees between 14 and 16 years of age] shall be confined to the following periods:

(1) Outside school hours;

[Footnote continued on page 6]

In June, 1971, a one page summary of Regulation number 3, on corporate letterhead paper, was circulated to restaurant managers.

In July, 1973, following an investigation at a restaurant known as "Jerry's #7" in Lexington, Kentucky, the investigating officer notified the manager that four busboys under the age of 16 had worked after 7 p.m. in violation of Regulation number 3. The manager testified that within two weeks of this notice, he received "a memo from the main office to comply with the law or get out."

Following an investigation of "Jerry's #2" in Lexington, a compliance officer notified a corporate vice president, in December, 1974, of the fact that two waitresses at that restaurant had worked later than 7 p.m. in violation of Regulation number 3.[3]

Following an investigation of 5 or 6 of respondent's restaurants, in March, 1975, the investigating officer notified respondent's regional manager that two employees under the age of 16 were employed in the kitchens of two restaurants in Shelbyville, Kentucky, in violation of Regulation number 3.[4]

---

[2] [Continued]

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer . . . when the evening hour will be 9 p.m.

* * * * *

[3] The corporate officer testified that he could not recall the occasion.

[4] 29 C.F.R. 570.34(b)

* * * * *

Paragraph (a) of this section [permitted occupations] shall not be construed to permit the application of this subsection to

In June, 1975, a compliance officer went to Jerrico's home office in Lexington to investigate two restaurants. Finding violations of the child labor regulations, he determined that the investigation should be broadened to include all of the "Jerry's" restaurants in the five state area mentioned, *supra*. The investigation covered employment during the two year period from June, 1973 to June, 1975. On August 1, 1975, the compliance officer notified corporate counsel that the investigation disclosed that 169 minors had been, or were presently, employed by respondent in violation of the child labor provisions of the Act.

Briefly, the violations consisted of;

1. Employment of 7 persons under the age of 14.
2. Employment of 162 persons under the age of 16 for periods and at hours forbidden by Regulation number 3.
3. Employment of two of the above 162 persons in occupations not permitted by Regulation number 3.

In due course a penalty was assessed against respondent. The assistant regional administrator calculated the penalties, giving consideration to factors set forth in section 216(e) of the Act and Regulations (29 C.F.R. 579.5) promulgated by the Secretary for such purpose.

The penalties were as follows:

Violation 1	$ 2,100
Violation 2	16,200
Violation 3	200

. . . the following occupations in . . . food service . . . establishments.

* * * * *

(5) Cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking.

* * * * *

Although the compliance officer who conducted this investigation testified, he did not state whether these violations involved prohibited hours or prohibited occupations. The form 103's identify the violations only as "CL Reg. 3."

added to this amount was the sum of $84,500, representing $500 for each of the 169 persons employed for periods and under conditions similar to those found in previous investigations of respondent's restaurants.[5]

At the hearing, respondent's corporate officers who testified professed ignorance of violations of the child labor section of the Act earlier than those of which they were notified following the latest investigation.

Nevertheless, it is undisputed that, within the year following notification of a corporate officer (who did not testify) of the violations which occurred in 1969, some responsible officer at respondent's corporate headquarters circulated a summary of the Act's child labor requirements to restaurant managers. The manager of a restaurant at which violations were discovered in 1973 received a memo "from the main office" shortly after the conclusion of the investigation advising him "to comply with the law or get out."

Respondent's vice president testified that it was "very difficult to effect compliance with the law," explaining that at 6:30 and 9:00 p.m., "the restaurant is going 120 percent" because this is the dinner hour. According to the witness," a manager under pressure is not going to tell a [minor] to go home."

He also explained that violations of this nature were not as obvious at the corporate headquarters as the testimony of one of plaintiff's witnesses suggested. Thus, although employee's time cards bear, *inter alia*, their dates of birth, the timecard is not submitted to headquarters until a week after the payroll has been prepared because each restaurant manager submits a weekly "computer sheet" from information on the timecards, which compilation serves as the payroll source.

Respondent's general counsel testified that the workforce turnover during the two years covered by the investigation was in excess of 8,500 persons and that the turnover from 1969 to 1975 was in excess of 13,500 employees. He also testified that when he was informed, following the 1975 investigation, that 169 violations had been discovered, he realized that "there was a problem in all the stores" that the difficulty was "chain wide." In consequence, he recommended that company policy be changed and that management announce to the restaurant managers that no persons under the age of 16 would henceforth be hired and that currently employed persons under that age be discharged. His recommendations was accepted and the policy was announced in July, 1975. He stated that an additional consequence of the discovery of "chain-wide" violations was the discharge of "2 to 3" restaurant managers.

[5] 29 C.F.R. 579.5(c), *viz.*;

> In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity the violation or violations, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations.

Findings of fact and Conclusions of Law

Having considered the entire record, including the testimony, exhibits and briefs, and having observed the demeanor of the witnesses, I make the following findings of fact, conclusions of law and decision and order based thereon.

Jurisdiction is not in dispute.

The facts are set forth, *supra.*

Concerning the disputed question of notice to respondent of violations of child labor Regulations in 1969, 1973, 1974 and 1975, I credit the testimony of the solicitor's witnesses, and find that in each case a responsible agent of respondent was timely notified. That is not to say that I believe respondent's witnesses testified falsely. Rather, I believe that their memories were less precise and that a significant circumstance in this matter is directly related to the substance of such testimony and the reasons therefor.

Thus, the record demonstrates that the earlier violations were regarded by responsible management as isolated, unusual and easily corrected by a combination of education—the 1971 memorandum summarizing requirements—and straightforward exercise of management prerogative—the 1973 direction to the manager of "Jerry's #7" to "comply with the law or get out." I credit re-

spondent's witness' testimony that it was not until notification of the wide-spread violations upon which the instant proceedings are based, that management realized that the problems were "serious" and "chain-wide." Whether management's immediate action to eliminate the circumstances which underlay the violations and discipline some of the responsible restaurant managers was motivated by a desire to avoid the threatened imposition of a significant money penalty or a public spirited impulse to abide by the Act is of no consequence. The immediate and far-reaching actions taken are, if not probative, at least corroborative of respondent's officials protestations that they sincerely believed that necessary and reasonable corrective action had long since been taken and that violations which had been minor and infrequent in the past had ceased as a result of measures reasonably calculated to correct the underlying causes.

Another circumstances which I perceive to have been afforded greater weight than warranted was the presence of a birth date on each timecard examined by the compliance officer. Thus, asked when he reached the conclusion that the violations were willful, he replied, ". . . when I saw the extent [and] nature . . . and I saw that here we had violations on the face of the record and we had 20 at [a] time . . . and the indication of the violations were contained in the date of birth and the information [was] available on the time cards [,] the Employer had knowledge. . . ." Plainly, he assumed that each week some agent of respondent, in making up the payroll, read or could have read information showing that the employee was a minor and at the same time calculated a pay check representing what could not be mistaken for anything but payment for working an unlawful number of hours or hours during which employment was prohibited or both. The record shows, however, that this was not the case. Rather, the payroll was prepared from "computer sheets" and the time cards, which did indeed show violations on their face, were submitted a week later only to serve as base records consulted in the event of erroneous calculations or other circumstances requiring the checking of bases for events (payment) which had already occurred.

These circumstances are not exculpatory. Nevertheless, they explain the circumstances underlying the assessing officer's conclusion that the violations were repeated and willful. Accordingly, to the extent that the judgment concerning willfulness rests upon these matters. I must disagree.

What the record reveals is a course of violations, first disclosed in the 1969 investigation. From that time until the disclosure of "chain-wide" violations in the instant case, management had no reason to believe that corrective actions taken were ineffective. With the exception of the 1971 memorandum, corrective action was selectively directed to what management reasonably believed to be isolated instances of violations of the child labor regulations. I do not question the Secretary's assertion that management could have discovered this continuous and wide-spread course of conduct engaged in by its managers. Perhaps the record discloses evidence of poor management. If so, it is not so poor as to become "willful." I am unwilling to base a determination in a mixed matter of fact and law upon business judgment in a field in which neither I nor the Secretary possess expertise. It begs the question to assert that it need not be proved that respondent had evil intent. It must be shown that respondent knew of the violations or should have known of the violations by the exercise of reasonable care. The record shows that, before learning that the violations were "chain-wide," respondent took steps reasonably calculated to stop current violations and prevent further abuse. Similarly, learning of the extent of violations in 1975, it took swift and appropriate action. In short, I find that the Secretary has not established a record upon which to base a reasonable determination that the violations were willful or that Jerrico's management failed to take reasonable precautions to avoid violations.

That the violations occurred is undisputed. Respondent's responsibility cannot be disputed. Nor can respondent dispute the fact that at the time of the violations, the statute provided that "[a]ny person who violates the provisions . . . relating to child labor, or any regulation issued under that section, shall be subject to a civil

penalty not to exceed $1,000 for each such violation." In these circumstances, it does not lie in respondent's mouth to assert that because the violations occurred before the Secretary promulgated guidelines for the determination of the amounts of penalties, no penalties may be assessed. Ironically, the guidelines complained of served to reduce the penalty assessed below that authorized by the statute. Nor were the regulations applied retroactively. In the process of administering the Act, the last process is the assessment of the penalty. The process was accomplished after the effective date of the regulations. The position of respondent that it is somehow prejudiced by having been penalized in an amount less than the $169,000 which reading the statute would have disclosed was its maximum exposure when the violations occurred is sound in neither law nor logic.

Finally, respondent has failed to show that the elements considered by the Secretary and the methods employed in arriving at the amount of the penalty were in any way unreasonable or arbitrary.

ORDER

I affirm the determination of the Secretary that the violations for which a penalty was assessed did occur.

Jerrico, Inc. shall pay forthwith, in accordance with the Act and regulations thereunder, a penalty in the amount of $18,500.

/s/ Peter McC. Giesey
Administrative Law Judge

Dated: October 5, 1977
Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

GASCH, J.

JERRICO, INC.
d/b/a Jerry's Restaurants
P.O. Box 11988
Lexington, Kentucky 40503
606/276-2525, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF LABOR
2nd and Constitution Avenue, NW
Washington, DC 20210
202/523-8010

RAY MARSHALL
Secretary of Labor
U.S. Department of Labor
2nd and Constitution Avenue, NW
Washington, DC 20210
202/523/8271

DONALD ELISBURG
Assistant Secretary
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202/523-8305

STERLING WILLIAMS
Assistant Regional Administrator
Employment Standards Administration
Wage and Hour Division
U.S. Department of Labor
1931 Ninth Avenue, South
Birmingham, Alabama 35205
205/325-3301, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought pursuant to the provisions of 28 U.S.C. § 1331 to secure from this Honorable Court an order declaring that Section 16(e) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 216(e) [hereinafter referred to as the FLSA] and regulations promulgated thereunder at 29 C.F.R. Parts 579 and 580 are unlawful and violate the Constitution of the United States and enjoining Defendants from enforcing said provisions.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this dispute under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1970); the jurisdictional provision of the Judicial Code relating to federal questions, 28 U.S.C. § 1331 (1970); 28 U.S.C. § 1361; the Declaratory Judgment Act, 28 U.S.C. § 2201 (1970); and the "All Writs" Act, 28 U.S.C. § 1651 (1970). The amount in controversy is $18,500, exclusive of interest and costs. This action arises under the due process clause of the Fifth Amendment to the United States Constitution. Venue is predicated upon 28 U.S.C. § 1391(e) (1970). Plaintiff has exhausted all administrative remedies within the United States Department of Labor (hereinafter referred to as D.O.L.).

PARTIES

3. The named Plaintiff, Jerrico, Inc., is engaged in the business of establishing, managing, and operating restaurants. Jerrico, Inc. is a Delaware corporation with its corporate headquarters located in Lexington, Kentucky. Among the restaurants operated by Jerrico, Inc. during the period in question, there were 40 establishments trading as "Jerry's" located in Kentucky, Indiana, Tennessee, Georgia and Florida.

4. The Defendant, United States Department of Labor, is an agency of the United States government. All individuals named as Defendants are officials of the U.S. Department of Labor who, acting in their official capacities, are responsible for implementing and enforcing the FLSA and the regulations promulgated pursuant thereto. The individuals named as Defendants are sued in their representative capacities in which they are ultimately responsible for enforcement of the FLSA and regulations, and are ultimately responsible for the actions challenged in this complaint. The declaratory and injunctive relief requested herein is not confined to the named Defendants personally, but extends to and includes all of the employees, officers, attorneys, and agents of the United States Department of Labor.

NATURE OF CONTROVERSY

5. An administrative proceeding was commenced by the Defendants against the Plaintiff pursuant to Section 216(e) of the FLSA and applicable regulations charging violations of the child labor regulations contained at 29 C.F.R. 570.35(a). At the completion of the administrative hearing and after the submission of proposed findings of fact and conclusions of law by both parties Administrative Law Judge Peter McCann Giesey entered judgment in favor of the Labor Department in the amount of $18,500 and ordered Jerrico, Inc. to pay the penalty forthwith.

6. This complaint does not challenge the determination by Judge Giesey except to the extent that Plaintiff challenges the constitutionality of Section 216(e) of the FLSA which reads in relevant part:

> ". . . Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the

costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9(a))".

The Section of the "Act" referenced in the above quote states:

> "All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States." (29 U.S.C. § 9(a))

7. The language of Section 216(e) referenced above is not permissive but rather states that penalties recovered in child labor administrative actions such as that involved herein "shall" be applied toward reimbursement of the costs of determining, collecting, and assessing such penalties. The language of Section 9(a) provides that monies received shall be deposited to the credit of the division which supervised the work and may be used for the ordinary expenses of the division. To the best of Plaintiff's knowledge, Section 216(e) of the FLSA is the only United States Code provision in existence which contains language mandating that penalties collected by a United States government agency be used to reimburse the agency for determining, assessing, and collecting the penalties. Such a procedure creates actual bias, the potential for bias, and the appearance of bias. To avoid such bias all other United States statutes, pursuant to which civil money penalties are imposed, provide that monies collected as penalties be deposited in the general treasury of the United States. Section 216(e) of the

FLSA is, therefore, unconstitutional as violative of the due process requirements of the Fifth Amendment to the United States Constitution.

PRAYER

WHEREFORE, Plaintiff prays this Honorable Court to issue the following:

1) A judgment declaring that Section 216(e) of the FLSA and regulations promulgated thereunder for the assessment and collection of civil money penalties by the Defendants violate the due process clause of the Fifth Amendment to the United States Constitution, and

2) A judgment enjoining and restraining preliminarily and permanently Defendants, their agents, and employees from enforcing Section 216(e) of the FLSA and the regulations promulgated thereunder, and

3) An order granting Plaintiff costs and attorneys fees incurred in the bringing of this action, and such other relief as may be found by the Court to be proper.

Respectfully submitted,

/s/ Thomas W. Power
THOMAS W. POWER

/s/ Robert D. McDonald
ROBERT D. MCDONALD
Attorneys for Plaintiff

DATED: January 25, 1978

VERIFICATION

DISTRICT OF COLUMBIA) ss:

Robert D. McDonald, being duly sworn, deposed, and says that he is associate counsel for Jerrico, Inc. in the above-titled matter, that he has been specifically authorized to verify this Complaint, that he has read the foregoing Complaint, and that the contents thereof are true either of his own knowledge or on the basis of information and belief.

/s/ Robert D. McDonald
ROBERT D. MCDONALD

SUBSCRIBED AND SWORN to before me this 24th day of January, 1978.

/s/ Nora M. Burus
Notary Public, D.C.

My Commission Expires Dec. 14, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Received May 26, 1978]

Civil Action No. 78-0128

JERRICO, INC.
d/b/a Jerry's Restaurants, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.,
DEFENDANTS

ANSWER

The defendants answer the Plaintiff's complaint as follows:

First Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

1. Defendants allege that paragraphs 1 and 2 of plaintiff's complaint contain conclusions of law, relate to jurisdiction and venue, are descriptive, and thus require no answer, but to the extent that an answer is required, each of the same is hereby categorically denied.
2. Defendants admit the allegations contained in paragraphs 3, 4, 5, & 6 of plaintiff's complaint.
3. Defendants deny the allegations contained in paragraph 7 of the complaint and the prayers for relief contained therein.

WHEREFORE defendants, having fully answered, pray that the complaint against them be dismissed and that the plaintiff take nothing.

Respectfully submitted,

CARIN ANN CLAUSS
Solicitor of Labor

RONALD G. WHITING
Associate Solicitor
Division of General Legal Services

PAUL E. MYERSON
Counsel for Employment Standards

ELIZABETH S. BONFILS
Assistant Counsel

MARCIA A. LURENSKY
Staff Attorney

Attorneys for Defendants

/s/ Paul E. Myerson

Mailing Address:

200 Constitution Avenue, NW
Room N-2464
Washington, D.C. 20210
(202) 523-8244

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Answer was mailed on this 26 day of May, 1978, to Thomas W. Power, Esq., and Robert D. McDonald, Esq., Attorneys for Plaintiff, 1666 K Street, NW, Suite 611, Washington, D.C., 20006.

/s/ Paul E. Myerson
PAUL E. MYERSON
Counsel for Employment Standards
Division of General Legal Services

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0128

[Received Oct. 23, 1978]

JERRICO, INC., PLAINTIFF

v.

U.S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

FEDERAL DEFENDANTS' ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

The Federal defendants, in answer to Plaintiff's Interrogatories (First Set), state as follows:

INTERROGATORY NO. 1:

Please state for the period commencing July 18, 1975 and ending on the date of your response to these interrogatories the total dollar figure for child labor civil money penalties assessed by the U.S. Department of Labor pursuant to its Fair Labor Standards Act authority, 29 U.S.C. § 216(e). If you are unable to provide an exact dollar figure, please provide your best estimate of the dollar figure requested providing the names of the persons with whom you consulted in arriving at this estimate, and state with specificity the information each person provided, and the analysis and substance of the analysis which was utilized in arriving at the estimate.

ANSWER TO INTERROGATORY NO. 1:

On the basis of information furnished to the undersigned by Karen Severn, Budget Analyst, United States Department of Labor, Room C-3307, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-7078, and William Nakamura, Administrative Of-

ficer, Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-7531, the following information is submitted:

Date	Amounts Assessed
7/18/75-9/20/77	$1,283,155
9/21/77-9/20/78	$1,850,831

INTERROGATORY NO. 2:

With reference to the child labor civil money penalty assessments referenced in INTERROGATORY NO. 1, please answer the following:

(a) What dollar amount of such penalties has been collected by the Labor Department to the date of your responses to these interrogatories?

(b) What is the present location of penalties collected?

(c) Has the Labor Department allocated any portion of the penalties collected to any bureau, service, office, division, or other agencies of the Department of Labor for the purposes of reimbursing those offices for the cost of determining the violations, and assessing and collecting such penalties?

(d) If the answer to (c) is yes, please state with particularity the criteria that were employed in distributing the collected penalties, the amounts distributed, the purpose for which the penalties were distributed, and the name of the official or the bureau, service, office, division, or other agencies of the Department of Labor to which monies were distributed.

(e) If the answer to (c) is no, does the Department of Labor propose to distribute the monies collected on the basis of the actual cost of work performed, including salaries and apportioned overhead of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work? If yes, when will such a program commence?

(f) Assuming that penalties collected exceed the costs of all bureaus, services, offices, divisions, or other agencies

of the U.S. Department of Labor in determining the violations assessing and collecting such penalties, what does the U.S. Department of Labor propose to do with excess penalties collected in such a case?

(g) Does the Department of Labor intend to reimburse costs of various bureaus, services, offices, divisions, or other agencies of the Department of Labor in determining the violations and assessing and collecting child labor penalties in relation to the amount of penalties collected from the investigations in which that particular bureau, service, office, division, or other agencies of the Department of Labor was involved? If so, please describe what system of apportionment would be used?

(h) Does the Department of Labor intend to develop some reimbursement system as referenced in (g) whereby commissions, bonuses, or other additional compensation is provided to those bureaus, services, offices, divisions, or other agencies of the Department of Labor, or individuals, which have been successful in collecting large amounts of child labor penalties? If so, please explain the system which will be utilized.

(i) If the answers to (e), (f), (g), and (h) were all in the negative, please state with particularity the purpose to which monies collected as child labor civil money penalties will be used by the Department of Labor.

ANSWER TO INTERROGATORY NO. 2:

On the basis of information furnished to the undersigned by Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards, Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-8353, and Lucille C. Pinkett, Chief, Branch of Child Labor, Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Room S-3022, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-8412, the following information is submitted:

INTERROGATORY NO. 2:

With reference to the child labor civil money penalty assessments referenced in INTERROGATORY NO. 1, please answer the following:

What dollar amount of such penalties has been collected by the Labor Department to the date of your responses to these interrogatories?

ANSWER TO INTERROGATORY NO. 2(a):

Date	Total Collections
November 1975	
June 1976	$ 70,565.00
Transition Quarter	80,364.00
Total FY 1976	$150,929.00
10/1/76-9/30/77	$649,814.00
10/1/77-8/31/78	$592,527.60

INTERROGATORY NO. 2(b):

What is the present location of penalties collected?

ANSWER TO INTERROGATORY NO. 2(b):

All child labor penalty monies were used as reimburseables in FY 1976 and FY 1977. Appropriated funds were returned to the Treasury. No disbursements have been made with funds collected in FY 1978. Monies are currently being held in a Treasury account.

Unobligated balance lapsed FY 1976 + TO $981,000
Unobligated balance lapsed FY 1977 $870,000
Estimated lapse to U.S. Treasury for FY 1978 $4,600,000

INTERROGATORY NO. 2(c):

Has the Labor Department allocated any portion of the penalties collected to any bureau, service, office, division, or other agencies of the Department of Labor for the purposes of reimbursing those offices for the cost of

determining the violations, and assessing and collecting such penalties?

ANSWER TO INTERROGATORY NO. 2(c):

Date	Funds Allotted	Distribution
Transition Qtr.	$ 82,578	
6/8/76	47,886	
6/28/76	16,735	
Total FY 1976	$147,199	National Office—W-H
FY 1977	$194,800	National Office—W-H
	5,700	Boston—W-H, Reg. Ofc.
	10,800	New York—W-H, Reg. Ofc.
	11,900	Phila.—W-H, Reg. Ofc.
	39,200	Atlanta—W-H, Reg. Ofc.
	44,300	Chicago—W-H, Reg. Ofc.
	21,300	Dallas—W-H, Reg. Ofc.
	9,000	Kansas City—W-H, Reg. Ofc.
	4,900	Denver—W-H, Reg. Ofc.
	12,400	San Fran.—W-H, Reg. Ofc.
	5,500	Seattle—W-H, Reg. Ofc.
	200,000	Solicitors Office (SOL)
Total FY 1977	$559,800	
FY 1978	—	Held in Treasury
FY 1979	—	Held in Treasury

INTERROGATORY NO. 2(d):

If the answer to (c) is yes, please state with particularity the criteria that were employed in distributing the collected penalties, the amounts distributed, the purpose for which the penalties were distributed, and the name of the official or the bureau, service, office, division, or other agencies of the Department of Labor to which monies were distributed.

ANSWER TO INTERROGATORY NO. 2(d):

Funds were allocated and distributed to the bureaus, offices, services, or divisions identified in answer no. 2(c) hereof for the purpose of reimbursement of child labor obligated funds. Field allotments were made in pro rata distribution based on total obligations incurred in connec-

tion with child labor enforcement. National Office allotments were made as reimbursements of costs for administration. Transfer of funds to the Office of the Solicitor was reimbursement for costs incurred in litigation of child labor matters.

INTERROGATORY NO. 2(e):

If the answer to (c) is no, does the Department of Labor propose to distribute the monies collected on the basis of the actual cost of work performed, including salaries and apportioned overhead of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work? If yes, when will such a program commence?

ANSWER TO INTERROGATORIES NO. 2(e):

For FY 1976, see answer to Interrogatory No. 2(c).
For FY 1977, see answer to Interrogatory No. 2(c).
For FY 1978, no funds have been allocated or disbursed.
For FY 1979, no determination has been made.

INTERROGATORY NO. 2(f):

Assuming that penalties collected exceed the costs of all bureaus, services, offices, divisions, or other agencies of the U.S. Department of Labor in determining the violations assessing and collecting such penalties, what does the U.S. Department of Labor propose to do with excess penalties collected in such a case?

ANSWER TO INTERROGATORY NO. 2(f):

Remit to Treasury of the United States.

INTERROGATORY NO. 2(g):

Does the Department of Labor intend to reimburse costs of various bureaus, services, offices, divisions, or other agencies of the Department of Labor in determining

the violations and assessing and collecting child labor penalties in relation to the amount of penalties collected from the investigations in which that particular bureau, service, office, division, or other agencies of the Department of Labor was involved? If so, please describe what system of apportionment would be used?

ANSWER TO INTERROGATORY NO. 2(g):

No.

INTERROGATORY NO. 2(h):

Does the Department of Labor intend to develop some reimbursement system as referenced in (g) whereby commissions, bonuses, or other additional compensation is provided to those bureaus, services, offices, divisions, or other agencies of the Department of Labor, or individuals, which have been successful in collecting large amounts of child labor penalties? If so, please explain the system which will be utilized.

ANSWER TO INTERROGATORY NO. 2(h):

No.

INTERROGATORY NO. 2(i):

If the answers to (e), (f), (g), and (h) were all in the negative, please state with particularity the purpose to which monies collected as child labor civil money penalties will be used by the Department of Labor.

ANSWER TO INTERROGATORY NO. 2(i):

To the extent funds collected from penalties are used by the Department of Labor, such use will be as reimbursement of obligated child labor expenditures.

INTERROGATORY NO. 3:

Please provide your best estimate of the total time devoted to child labor administrative adjudications by the Office of the Administrative Law Judges of the U.S.

Department of Labor from July 18, 1975 to the date of your response to these interrogatories. Please indicate your best estimate of the proportion which such time bears to the total time by such office devoted to all responsibilities it has to the U.S. Department of Labor. In addition, please provide the names of the persons with whom you consulted in arriving at this estimate, and state with specificity the information each person provided, and the analysis and substance of the analysis which was utilized in arriving at the estimate.

ANSWER TO INTERROGATORY NO. 3:

In the basis of information furnished to the undersigned by H. Stephen Gordon, Chief Judge, Office of Administrative Law Judges, United States Department of Labor, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036, telephone (202) 653-5052, the following information is submitted for the period July 18, 1975 through May 30, 1978:

Number of child labor cases docketed: 167

Number of total cases docketed: 12,470

Percentage of child labor cases to total: 1.3%

Listed below are the statutes under which administrative proceedings are conducted by the Office of Administrative Law Judges, United States Department of Labor:

1. *LONGSHORMEN'S AND HARBOR WORKERS' COMPENSATION ACT*
   33 U.S.C. § 901, *es seq.*
2. *DISTRICT OF COLUMBIA COMPENSATION ACT*
   36 D.C. Code § 501, *et seq.*
3. *DEFENSE BASE ACT*
   42 U.S.C. § 1651, *et seq.*
4. *OUTER CONTINENTAL SHELF LANDS ACT*
   43 U.S.C. § 1331, *et seq.*

5. *NON-APPROPRIATED FUND INSTRUMENTALITIES ACT*
   5 U.S.C. § 171, *et seq.*
6. *FEDERAL COAL MINE HEALTH AND SAFETY ACT AS AMENDED BY THE BLACK LUNG BENEFITS ACT OF 1972*
   30 U.S.C. § 901, *et seq.*
7. *WAGNER-PEYSER ACT OF 1933*
   29 U.S.C. § 49, *et seq.*
8. *IMMIGRATION AND NATIONALITY ACT*
   8 U.S.C. § 1101
9. *WATER POLLUTION*
   33 U.S.C. §§ 466, 1367
10. *FARM LABOR CONTRACTOR REGISTRATION ACT*
    7 U.S.C. § 2041, *et seq.*
11. *OCCUPATIONAL SAFETY AND HEALTH ACT*
    29 U.S.C. § 667
12. *FAIR LABOR STANDARDS ACT*
    29 U.S.C. § 201
13. *NATIONAL REVIEW PANEL*
    29 C.F.R. § 357.9
14. *BOARD OF CONTRACT APPEALS—U.S. DEPARTMENT OF LABOR*
    5 U.S.C. § 301, Reorganization Plan No. 6 of 1950, 15 F.R. 3174, 64 Stat. 1263, 5 U.S.C. Appendix
15. *SERVICE CONTRACT ACT*
    41 U.S.C. § 351, *et seq.*
16. *DAVIS-BACON ACT*
    40 U.S.C. § 276a, *et seq.*
17. *CONTRACT WORK HOURS STANDARDS ACT*
    40 U.S.C. § 328, *et seq.*

18. *NATIONAL HOUSING ACT*
12 U.S.C. § 1713, *et seq.*

19. *HOSPITAL SURVEY AND CONSTRUCTION ACT*
42 U.S.C. § 29(h)

20. *FEDERAL AIRPORT ACT*
49 U.S.C. § 1114

21. *HOUSING ACT OF 1949*
42 U.S.C. § 1459

22. *SCHOOL SURVEY AND CONSTRUCTION ACT OF 1950*
20 U.S.C. § 636

23. *DEFENSE HOUSING AND COMMUNITY FACILITIES AND SERVICES ACT OF 1951*
42 U.S.C. 15921

24. *UNITED STATES HOUSING ACT OF 1937*
42 U.S.C. § 1416

25. *FEDERAL CIVIL DEFENSE ACT OF 1950*
50 U.S.C. App. § 2281

26. *AREA REDEVELOPMENT ACT*
42 U.S.C. § 2518

27. *DELAWARE RIVER BASIN COMPACT*
75 Stat. 714, Sec. 15.1

28. *HEALTH PROFESSIONS EDUCATIONAL ASSOCIATION ACT OF 1963*
42 U.S.C. § 292 d(c), 293a(C) (5)

29. *MENTAL RETARDATION FACILITIES CONSTRUCTION ACT*
42 U.S.C. §§ 295(a) (2) (d), 2662(5), 2675(a) (5)

30. *COMMUNITY MENTAL HEALTH CENTERS ACT*
42 U.S.C. § 2685(a) (5)

31. *HIGHER EDUCATIONAL FACILITIES ACT OF 1963*
20 U.S.C. § 753

32. *VOCATIONAL EDUCATIONAL ACT OF 1963*
20 U.S.C. § 35f

33. *LIBRARY SERVICES AND CONSTRUCTION ACT*
20 U.S.C. § 355(a) (4)

34. *URBAN MASS TRANSPORTATION ACT OF 1964*
78 Stat. 307, Sec. 10a

35. *ECONOMIC OPPORTUNITY ACT OF 1964*
78 Stat. 532, Sec. 607

36. *PUBLIC HEALTH SERVICE ACT*
78 Stat. 454, Sec. 605(a) (5)

37. *HOUSING ACT OF 1964*
78 Stat. 795

38. *THE COMMERCIAL FISHERIES RESEARCH AND DEVELOPMENT ACT OF 1964*
78 Stat. 199, Sec. 7

39. *THE NURSE TRAINING ACT OF 1964*
78 Stat. 910, Sec. 2

40. *ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965*
20 U.S.C. § 239

41. *APPALACHIAN REGIONAL DEVELOPMENT ACT OF 1965*
79 Stat. 5, Sec. 402

42. *NATIONAL TECHNICAL INSTITUTE FOR THE DEAF ACT*
79 Stat. 125, 126, Sec. 5(b) (5)

43. *OFFICE OF FEDERAL CONTRACT COMPLIANCE* (Public Contracts and Property Management)

EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

E.O. 11246

44. *LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE*

E.O. 11491

45. *EMPLOYEE-MANAGEMENT RELATIONS IN THE FOREIGN SERVICE OF THE UNITED STATES*

E.O. 11636

46. *REHABILITATION ACT OF 1973*
29 U.S.C. 793; E.O. 11758

47. *WALSH-HEALEY ACT*
41 U.S.C. § 35, *et seq.*

48. *COMPREHENSIVE EMPLOYMENT AND TRAINING ACT (CETA)*

Pub. Law 92-203, 87 Stat. 839
Pub. Law 93-567, 88 Stat. 1845, Sec. 702(a)

49. *SAFETY, etc. SECTION 41, LONGSHOREMEN'S AND HARBOR WORKERS COMPENSATION ACT*

33 U.S.C. § 941; 29 C.F.R. § 1921.1, *et seq.*
(APA—1921.21)

50. *OCCUPATIONAL SAFETY AND HEALTH ACT—APPROVAL OF STATE PLANS*

29 C.F.R. § 1902.11(e)

51. *FAIR LABOR STANDARDS ACT—Fair value of board, lodging, or other facilities*

29 U.S.C. § 203(m); 29 C.F.R. 531.3, *et seq.*

52. *INTEGRATED GRANT ADMINISTRATION*

Pub. Law 92-203, 87 Stat. 839
Pub. Law 93-567, 88 Stat. 1945, Sec. 702(a)

53. *TOXIC SUBSTANCES CONTROL ACT*

Pub. Law 94-469, 90 Stat. 2003
(10/11/76, effective January 1, 1977)
[Section 23—Employee Protection
15 U.S.C. § 2622]

54. *RESOURCE CONSERVATION AND RECOVERY ACT OF 1976*

Pub. Law 94-580, 90 Stat. 2795
(10/21/76, effective January 1, 1977)
[Section 7001—Employee Protection
42 U.S.C. § 6971]

55. *RESOURCE CONSERVATION AND RECOVERY ACT OF 1976*

Pub. Law 94-580, 90 Stat. 2795
[Section 7009—Wage Standards (Davis-Beacon)]

INTERROGATORY NO. 4:

Please state for the period commencing July 18, 1975 and ending on the date of your responses to these interrogatories, the number of Administrative Law Judges assigned to the Office of the Chief Administrative Law Judge, U.S. Department of Labor at the beginning and at the end of the period.

ANSWER TO INTERROGATORY NO. 4:

On the basis of information furnished to the undersigned by H. Stephen Gordon, Chief Judge, Office of Administrative Law Judges, United States Department of Labor, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036, telephone (202) 653-5052, the following information is submitted:

Number of ALJs on board in July of 1975: 29

Number of ALJs on board as of June 20, 1978: 46

Number of ALJs hired only for child labor cases: 0

Number of ALJs hearing only child labor cases: 0

INTERROGATORY NO. 5:

Please provide your best estimate of the total time devoted to child labor investigations, penalty assessment procedures, appearances at administrative hearings, Federal or State court proceedings, and other related activities by Wage and Hour Division Compliance Officers, Associate Regional Administrators, and other involved Wage and Hour Division employees for the period commencing July 18, 1975 and ending on the date of your responses to these interrogatories and the relationship such time bears to the time spent by such employees in meeting all their responsibilities. In addition, please provide the names of the persons with whom you consulted in arriving at this estimate, and state with specificity the information each person provided, and the analysis and substance of the analysis which was utilized in arriving at the estimate.

ANSWER TO INTERROGATORY NO. 5:

On the basis of information furnished to the undersigned by Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards, Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-8353, the following information is submitted:

During the period July 18, 1975 through June 30, 1978, an estimated 140,744 hours were spent by Wage and Hour personnel in child labor enforcement related matters. This estimate is based upon the records maintained with respect to Compliance Officers in the field pursuant to the Department's Financial Management Reporting System (FMRS) and estimates of Field and National Office clerical and professional employees for whom detailed time/program records are not kept. The estimates of field supervisory and clerical time expenditures were

secured from the Assistant Regional Administrators in each region. Estimates of National Office staff time expenditures were developed by Lucille C. Pinkett, Chief, Branch of Child Labor; Francis W. McGowan, Director of the Division of Equal Pay and Employment Standards; and Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards.

It is estimated that approximately 2 percent of total staff time is spent on child labor matters. Because of the nature of the FMRS data reported by Compliance Officers, the system tends to capture such data on the basis of the principal program of concern in each investigation rather than on the basis of time which might actually be spent in the various programs. It is quite probable, for example, that time spent in simultaneously checking for FLSA minimum wage, overtime, and child labor noncompliance would be reported only under one of these categories, particularly if violations were found with respect to only one.

INTERROGATORY NO. 6:

Please provide your best estimate of the total time devoted to child labor investigations, penalty assessments, administrative proceedings, Federal or State court proceedings, and other related activities by employees of National or Regional Offices of the Solicitor of Labor, U.S. Department of Labor, for the period commencing July 18, 1975 and ending on the date of your responses to these interrogatories and the relationship such time bears to the time spent by such employees in meeting all responsibilities. In addition, please provide the names of the persons with whom you consulted in arriving at this estimate, and state with specificity the information each person provided and the analysis and substance of the analysis which was utilized in arriving at the estimate.

ANSWER TO INTERROGATORY NO. 6:

On the basis of information furnished by Glenn L. Hogle, Budget and Management Officer, Office of the Solicitor, United States Department of Labor, Room

S-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-6884; Alvin Bramow, Deputy Associate Solicitor, Division of General Legal Services, Office of the Solicitor, Room N-2464, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 523-8293; and his secretary, Melissa R. Trusheim, of the same address, telephone (202) 523-9186, the following information is submitted:

During the period July 18, 1975 through June 30, 1978, an estimated 26,874 hours or 12.920 staff years, have been spent by attorneys in the Office of the Solicitor in child labor enforcement matters. These figures represent approximately 1 percent of the total attorney staff of the Office of the Solicitor.

These estimates were compiled from the attorney workload records submitted as monthly time distribution reports by the 16 field offices and 10 Washington operating divisions comprising the Office of the Solicitor, United States Department of Labor.

Because of the nature of reporting, data relating to clerical and supervisory time in support of child labor enforcement is not available.

INTERROGATORY NO. 7:

With reference to amounts assessed as civil money penalties pursuant to Section 16(e)(3) of the Fair Labor Standards Act, 29 U.S.C. § 216(e)(3), for the period commencing July 18, 1975 and ending on the date of your responses to these interrogatories, please answer the following:

> Has any employee of the Wage and Hour Division, Solicitor's Office or Office of Administrative Law Judges of the U.S. Department of Labor inquired, to your knowledge or to the knowledge of others with whom you may reasonably be expected to consult, either verbally or in writing of any official of the U.S. Department of Labor including but not limited to: Paul Myerson, Counsel, Employment Standards; Elizabeth Bonfils, Assistant Counsel, Employment Standards; Herbert Cohen, Office of Fair Labor Standards; Xavier Vela, Wage and Hour Administrator; Warren Landis, Deputy Wage-Hour Administrator; Ronald James, former Wage-Hour Administrator; or any other present or past official of the U.S. Department of Labor, as to the method and/or amount of distributions of assessed child labor penalties to his or her agency, division, or office?

If yes, please state the name of the person inquiring, the name of the person to whom the inquiry, whether verbal or written, was addressed, the date or approximate date of the inquiry, the substance of the inquiry, and such other information as will enable any relevant documents to be identified in a subpoena for the production thereof.

ANSWER TO INTERROGATORY NO. 7:

The Federal defendants object to Interrogatory No. 7 on the grounds that said interrogatory is too broad in scope, too vague and general as to the information sought, and that it is virtually impossible to respond to Interrogatory No. 7 in detail and with accuracy. However, without waiving their objections, and as evidence of their desire to cooperate with the plaintiff and to comply as fully as is possible with plaintiff's request, the Federal defendants offer the following information in response to Interrogatory No. 7:

In all probability during the period since the Fair Labor Standards Act was amended in 1974 so as to provide for civil money penalties to be assessed against employers who violate the child labor provisions of the Act, there have been numerous conversations amongst individual employees of the Department of Labor regarding Section 16(e) of the Act (29 U.S.C. § 216(e)), relating to civil money penalties. It is impossible to remember or otherwise document the parties to such conversations (if any), the content of such conversations (if any), or the date or dates of such conversations (if any).

However, in an attempt to ascertain such information, the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, made written inquiry to all Wage and Hour Assistant Regional Administrators on June 21, 1978, copy attached and made a part hereof as Exhibit A. The responses received are likewise attached hereto, made a part hereof, and marked as Exhibits B, C, and D.

Further, at various conferences held both by the Wage and Hour Division and the Office of the Solicitor, the subject of child labor penalties was discussed in general. Additionally, various officials and employees of the Department of Labor may have discussed, with representatives of plaintiff and the attorneys representing the plaintiff, the basis of assessment and the possible use of such penalties.

There are no memoranda or documents relevant to defendants' response to Interrogatory No. 7.

Likewise, inquiry of the persons referred to by plaintiff in Interrogatory No. 7, has failed to produce more than a general acknowledgement that verbal inquiry may, from time to time, have been made.

Finally, many of the individuals identified in plaintiff's Interrogatory No. 7, were and are involved in the legal defense of this matter. Any conversations relating thereto were in the capacity as attorney and client; such conversations, therefore, are privileged.

All of the foregoing answers and the objections to Interrogatory No. 7 are based on information presently available to the Federal defendants.

CARIN ANN CLAUSS,
Solicitor of Labor,

RONALD G. WHITING,
Associate Solicitor,

PAUL E. MYERSON,
Counsel for Employment
Standards,

MARCIA A. LURENSKY,
Attorney,

ATTORNEY FOR DEFENDANTS.

Address:

U.S. Department of Labor
Office of the Solicitor
Room N-2464
200 Constitution Ave., N.W.
Washington, D.C. 20210

By: /s/ Marcia A. Lurensky
MARCIA A. LURENSKY
Attorney, Division of
General Legal Services

EXHIBIT A

Jun 21 1978

MEMORANDUM FOR: ALL WAGE-HOUR/ARA'S

FROM: Xavier M. Vela
Administrator
/s/ William L. Smith

SUBJECT: Information Needed for Response to Interrogatories in the Child Labor Case of Jerrico, Incorporated v. U.S. Department of Labor (Attachment—copy of Interrogatories in Civil Action No. 78-0128, U.S. D.C. for D.C.)

Briefly, plaintiffs in this suit have charged that FLSA's Section 16(e) is unconstitutional on the grounds that the Department's use of CP/CMP monies creates an inherent bias against impartial enforcement. In connection with subject suit, we have been served with the attached Interrogatories. In order to be fully responsive we need the information from you set out below. This information must be in my office by no later than COB July 10, 1978.

1. The name, date and circumstances under which you or anyone on your staff has been contacted by a representative of Jerrico Incorporated or the Office of Thomas W. Power, Esquire (attorney for Jerrico) in connection with the assessment, allocation to various offices, and/or disbursement of CL/CMP monies. Be fully descriptive. If there have been correspondence or written records of such contacts, forward copies.

2. With regard to Interrogatory #5, unless unusual circumstances exist we believe that CO time as reported on the WH-40 would be responsive insofar as CO time is concerned. AAD, AD, Assistant to ARA, RA and ARA time may have to be based on estimates by those

individuals. Please note that such time, where records do not exist of time spent, must be identified by the individuals, and it may be that some or all would subsequently be deposed.

3. With regard to Interrogatory #7, this Interrogatory is self explanatory. Note the specificity required and the fact that the individuals must be identified. To the extent that there are written records of requests, notes of meetings or conversations, or other documentation, please include copies of them in your submission.

EXHIBIT B

Atlanta Region

ATTACHMENT 1

(Item 1 of Vela Memorandum 6/12/78)

1. ARA/WH Sterling B. Williams was contacted by telephone on December 24, 1975, by a Mr. Anderson and a Mr. Wilson (who were on extension telephones) regarding the CL/CMP assessment letter which Williams had sent to Jerrico. There is no record of this call, but a notation that such a call was made. Williams' recollection is that Messrs. Anderson and Wilson asked about the seemingly large amount of the assessment, and Williams explained that much of it was because the child labor violations were considered to be willful or recurring. When they professed to have no knowledge of previous investigations involving child labor, Williams suggested that they might want to contact Lexington Wage-Hour Area Director Ernest C. Orr for information about previous investigations.
2. Lexington CO Ernest F. Williams, Jr., was contacted by attorney Curtis L. Wilson, counsel for Jerrico, probably in December 1975. See CO Williams' memoranda 6/30/78, attached.
3. ARA/WH Sterling B. Williams was in contact with attorney Thomas W. Power when his deposition was taken 1/5/77 in Nashville, Tennessee in connection with the proceeding before an ALJ regarding the Jerrico CL/CMP assessment. This contact (the deposition) is a matter of court record, of course.
4. ARA/WH Sterling B. Williams was again in contact with attorney Thomas W. Power when he testified at the proceeding before the ALJ in Lexington, Kentucky, on 1/18/77. This testimony is a matter of court record, of course.

EXHIBIT C

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Suite C, Concord Square, 1460 Newton Road
Lexington, Kentucky 40505
(606) 233-2416

[SEAL]

DATE: June 30, 1978

REPLY TO:

ATTN OF:

SUBJECT: Contacts by Jerrico, Inc.

TO: Area Director Stuckey

To the best of my recollection the only representative of Jerrico, Inc, or the office of Thomas W Powers, who contacted me in connection with CL/CMP assessments was Curtis L Wilson, counsel for Jerrico, Inc. I remember that he called me shortly after he received the assessment letter. I don't remember the date but I think it was in December 1975. I do not recall exactly what was said and I do not recall making any kind of memorandum. I did not have the case file at the time and did not log time to the case. I do remember that Mr Wilson was shocked at the amount of the penalty assessment. As best I can recall I discussed the 1974 amendments and the limit of CL civil money penalties and I told Mr Wilson that I did not determine the appropriateness of any penalties.

Either at this time, or at a later time, —I do not remember when—, Mr. Wilson asked me about Form WH-265 and I told him that I could not give him information about the form. In both cases I referred him to the AD and/or ARA/WH.

I did not attempt to commit details to memory, and I do not have information of a more specific nature.

82
Ernest F Williams,Jr

EXHIBIT D

Atlanta Region

ATTACHMENT 3

(Item 3 of Vela Memorandum 6/21/78)

1. ARA/WH Sterling B. Williams remembers that at an ARA/WH Conference in December 1976, someone asked how the CL/CMP collections would be distributed, but he does not remember who made the inquiry. It is his recollection that the answer was only that the matter was still under study. This recollection is supported by WH/NO's summary of this Conference, which included the following as item 4 of "ACTION ITEMS DEVELOPED AT WAGE AND HOUR ARA CONFERENCE, WILLIAMSBURG, VA. (December 15-17, 1976)":

   "4. Prepare formula for allocation of major portion of CL-CMP's collected to the regions for furtherance of CL compliance efforts."

2. Two Area Directors (Gerald M. Parks, Ft. Lauderdale; and Labon F. Chappell, Jr., Jacksonville) report their recollection that someone asked the same question at an Atlanta Region AD Conference when a Washington representative was present, but neither remembers the date of the Conference or the identity of the Washington representative.

VERIFICATION

WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

Paul E. Myerson, being duly sworn, deposes and says:

He is an attorney employed by the United States Department of Labor, and is one of Defendants' counsel in the instant case and is authorized to make this verification on behalf of Defendants. He has read the foregoing Defendants' Answer to Plaintiff's Interrogatories (First Set) and believes the same to be true upon the basis of his knowledge and of information supplied to him.

/s/ Paul E. Myerson
PAUL E. MYERSON

Subscribed and sworn to before me
this 23rd day of October 1978.

/s/ Gwendolyn N. Jones
GWENDOLYN N. JONES
Notary Public

My Commission Expires Sept. 14, 1979

[SEAL]

EXHIBIT A TO PLAINTIFF'S STIPULATION IN RESPONSE TO DEFENDANT'S STATEMENT OF GENUINE ISSUES NECESSARY TO BE LITIGATED

EXHIBIT A

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

RE: W. J. Usery, Jr., Secretary of Labor vs. Jerrico, Inc. 76-CL-105

CERTIFICATION

This is to certify that the attached pages 3 through 7, and 26 through 28, are true and accurate copies of the Deposition of Sterling B. Williams taken on behalf of respondent in the above case on January 5, 1977.

/s/ Carol J. Ready
CAROL J. READY
Chief Legal Clerk

DATED: March 15, 1979

Attachments

* * * *

[3] MR. HAYNES: Mr. Power, may I interrupt just a moment?

MR. POWER: Sure.

MR. HAYNES: I think in order to make sure the record is perfectly clear, this deposition is being taken pursuant to the rules of practice provided for under the child labor provisions of the Fair Labor Standards Act and the regulations promulgated pursuant thereto. It is being taken without notice at the request of the respondent in this matter. The government has, by consent,

made available Mr. Williams for the purposes of taking this deposition.

BY MR. POWER:

Q All right. Among your responsibilities, you're authorized to represent the Secretary of Labor in assessing penalties under the child labor provisions of the Fair Labor Standards Act?

A Yes, sir.

Q To what extent of your present responsibilities does this responsibility represent? In other words, to what extent does assessing child labor penalties involve of your total responsibilities, if you have to make an estimate? Is it a major portion of your time or a very [4] minor portion?

A It is not the majority of my time, but it is a substantial amount of my time.

Q Assessing penalties under child labor?

A Yes, sir.

Q Could you give me an estimate in that term of majority? Is it more than twenty-five percent?

A I doubt that it would be that much.

Q Well, is it reasonable for me to assume that your responsibilities would probably involve some approximately ten percent of the total assessments of penalties in the United States by the Department of Labor? I'm just going by you—

A I do not know.

Q You would not hazard a guess, then?

A No.

Q Let me ask you another question. What happens to penalties, the sums that are collected as penalties under the Fair Labor Standards Act?

A The child labor civil money penalties?

Q Yes.

A It's my understanding that pursuant to the statute itself, the funds remain in the Department of Labor available for use by the Department of Labor for designated purposes.

[5] Q I see. And to what purposes would you mean by designated? Could you describe those purposes, where they might be used?

A No decision has yet been made, as far as I'm aware, by the department. There are still discussions about how the money should be used, discussions in progress.

Q I see. The act itself actually says that it should be credited to the cost of investigations of child labor violations under the act. Are you familiar with that provision?

A I do not know, by memory, the language of the statute.

Q Do you know whether the department has made any decision whether or not the funds should be used specifically for the Wage and Hour Division's activities and expenses?

A I do not, but if that's what the statute says, I assume that's what the decision will be.

Q Could it be used for handling the expenses of the solicitor's office?

A I do not know.

(At this time, a discussion was had off the record.)

BY MR. POWER:

Q Is it your understanding that the funds could be used for the expenses of operating the Wage and Hour [6] Division?

A That is my understanding.

Q Would it be your expectation that the funds would be apportioned in some manner to the operations under your responsibility, as opposed to the other Wage and Hour Division responsibilities? I'm just asking your opinion, now.

A Again, I would assume there would be some authorization for the federal establishment to use a designated amount of the funds.

Q Would you anticipate that part of the funds would be used in the compensation of employees under your direction and control?

MR. HAYNES: I'm going to interpose an objection for the record at this point. I think, in fact, the questions are a bit far afield, and certainly aren't relevant to the question of whether violations took place, nor to the reasonableness of the penalty involved.

MR. POWER: All right. Let me clarify, for the record and on the record, the thought that I have in mind here. We question the constitutionality of the statute itself, particularly because it provides for the application of the funds to the agency that makes the decision [7] regarding the amount of the penalty. Mr. Williams is the party that assessed the penalty. His own impressions or opinions to how the funds might be properly used, in our opinion, is relevant.

And I'll let the record stand as it is, because the initial response from Mr. Williams indicated there wasn't any decision made about where the funds were going to go anyhow. But that point, I do make, and I'll not pursue it any further, then.

MR. HAYNES: Very well.

BY MR. POWER:

Q In the course of your employment, you were assigned to the responsibility for evaluating the child labor violation or the alleged child labor violation of Jerrico Corporation, is that correct?

A Yes, sir.

Q When you first apprised of that investigation and the results of the investigation?

A Sometime in the fall of 1975.

* * * *

[26] Q And it is with these regulations that you have dealt during your experience with the Department of Labor?

A Yes, sir.

Q And you are familiar with them and are aware of contents of same?

A Yes, sir.

Q Did you have any role in the promulgation of the regulations to which you have referred in part 579?

A Not that I recall.

Q Mr. Williams, were you aware of the proposed amendments to the Fair Labor Standards Act which became effective May 1, 1974?

A Yes, sir.

Q Were you familiar on that date with the contents of said amendments?

A Yes, sir.

Q And you were aware of the provisions created by those amendments on May 1, 1974?

A Yes, sir.

Q Were you aware of the provisions of the act which required you to consider certain elements with respect to the assessment?

A Yes, sir.

Q You were aware, then, if I understand your testimony, that you were required by the regulation to [27] consider the size of the business and the gravity of the violations involved?

A Yes, sir.

Q And it is these factors to which you previously testify that you considered in making the proposed assessment?

A Yes, sir.

Q All right, sir. For the record, Mr. Williams, it might be helpful to have you explain how you came to make the assessment in this particular case; why you, rather than some other person, if you understand my question.

A I think I do. Under ordinary circumstances, the determination and assessment in this case would have been made by my counterpart in Atlanta, Mr. Hugh B. Campbell, who normally and regularly supervises the Wage-Hour function in the State of Kentucky through subordinate area officers. But at the time this assessment was under consideration, Mr. Campbell was on leave of absence because of a heart attack. And I was substituting for Mr. Campbell in the performance of this function.

Q And were you then authorized, pursuant to departmental regulations, to fill that role and to make said assessment?

A Yes, sir.

[28] Q You have been questioned, Mr. Williams, with respect to the utilization of penalty monies collected. Do you have any knowledge, at all, concerning what will be done with any penalty monies collected as a result of child labor violations?

A As I have stated previously here today, I'm not aware of a final decision having made made. I do know the matter has been under active and current discussion, and the discussions are in the direction of using the funds for enforcement expenses other than salary.

Q Then, any funds collected will not be used for salaries, insofar as you know?

A I cannot state they will not be. Insofar as I know, they will not be.

Q And so far as you know, will any funds so collected by used for any purpose other than direct enforcement of child labor regulations?

A Again, insofar as I know, they would not. But I'm not the one to make this decision.

Q Digressing a moment, Mr. Williams, with respect to Reg 3 which you have identified, was there any change in the substance of said regulation between May 1, 1974 and your proposed assessment in 1975 in this case?

A To the best of my knowledge, no.

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U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

RE: W. J. Usery, Jr., Secretary of Labor vs. Jerrico, Inc.
76-CL-105

CERTIFICATION

This is to certify that the attached pages 141 through 144 are true and accurate copies of the Hearing Transcript in the above case held on January 18, 1977.

/s/ Carol J. Ready
CAROL J. READY
Chief Legal Clerk

DATED: March 15, 1979

Attachments

* * * *

[141] Q Was it your understanding that it was in fact left with the representative of Jerrico's based upon that information on that date?

A I assumed it was since it bears that date, but I do not have any present recollection of any contrary indication in the file. All I know is what the form shows.

Q Getting into another area, Mr. Williams, what happens to the penalties that are assessed in connection with child labor violations to your knowledge?

A They are transmitted by me to our administrative office in Washington where as far as I know, they are all still held on deposit.

Q Has there been any consideration as to what might be done with those particular penalties?

A There have been discussions but I do not think that any decision has been reached.

Q Do you know what the Statute provides as far as the use of those particular penalties?

A Not the exact language, but I think it says something like to be used by the Department for the enforcement of the Act.

Q Would it be fair to say to reimburse you for costs in connection with the enforcement of the Act?

[142] A Probably, yes sir.

Q And was that your understanding of the Statute in general terms at the time that you made the assessment?

MR. HAYNES: I am going to object. The Statute will speak for itself. I think Mr. Williams has already testified that no decision has been reached with respect to the allocation of any of these funds. He said he didn't know.

MR. POWER: I think Mr. Williams, Your Honor, Mr. Williams' understanding of what the Statute requires or provides is a very important consideration and it should be a matter of record what his understanding was in assessing these penalties.

JUDGE GIESEY: If he has something more, it would be interesting to hear. He has already given us about everything there is to give us about his own personal understanding of the Statute, as far as it is concerned, and he's informed you that its irrelevant because the Department hasn't taken a position on it as yet.

MR. POWER: The Statute does make provision for the use of these particular funds and I do think that Mr. Williams' understanding of the potential use of those funds is very relevant in assessing the potential bias, in connection with bias, in making those assessments.

JUDGE GIESEY: Without having Mr. Williams' answer that is entirely possible. Even though it—he doesn't say [143] it, its entirely possible that Mr. Williams has visions of having 150 more employees all paid for by the monies spilled into the coffers of the Labor Department by Jerrico, Inc., not whether this is a possibility or a probability, its a matter of law, and your position on this subject is also a matter of law. If your position is correct, it doesn't make any difference whether

Mr. Williams has the same understanding that you do, as you urge, I mean, if your position is correct.

MR. POWER: I think a distinction can be made, Your Honor, between Mr. Williams' understanding of the law and the application of the fund and your own. For instance, the Administrative Legal Procedures. I think its entirely possible that the Statute would be interpreted in such a way that the matter, that knowledge was not known to the man making the assessment, but he had no knowledge of the possible intent for use of those funds.

JUDGE GIESEY: Oh, in that case, Mr. Power, you're home free already. Mr. Williams has already testified that he has full knowledge of the potential use of these funds; like most civil servants he's not really sure that his Employer is going to do what Congress appears to have told him to do.

MR. POWER: The only distinction I make, Your Honor, I think I am not going to pursue it with any more vigor, but the only point I am trying to ascertain for the record is whether or not he had knowledge at the time he made this [144] particular assessment.

MR. HAYNES: He's testified as to what he knew and what he did at the time he made the assessment. I don't see any point in belaboring it at this time.

JUDGE GIESEY: I would be very surprised if he didn't have complete knowledge as to the terms of the Statute. There are a lot of sophisticated opinions as to what they mean too. There are.

MR. POWER: May I put that particular question to him?

JUDGE GIESEY: Surely.

MR. POWER: Did you hear the question the Judge asked?

JUDGE GIESEY: I didn't ask a question.

MR. HAYNES: This is pure argument.

JUDGE GIESEY: That's right. But the question, Mr. Williams, is at the time you assessed this penalty, were you acquainted with the particular terms of the Statute to which Mr. Power has referred?

THE WITNESS: I take it for granted I was. I cannot pinpoint the date by the calendar when I was specifically aware of the statute provisions. I am confident this was no factor in the Jerrico assessment.

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SUPREME COURT OF THE UNITED STATES

No. 79-253

RAY MARSHALL, Secretary of Labor, ET AL., APPELLANTS

v.

JERRICO, INC.

Appeal from the United States District Court
for the District of Columbia

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 13, 1979

Mr. Justice Marshall took no part in the consideration or decision of this matter.

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